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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID GAGE SILVA, Defendant and Appellant.	B261856 (Los Angeles County Super. Ct. No. PA075013)

APPEAL from a judgment of the Superior Court of Los Angeles County. David W. Stuart, Judge. Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, David Gage Silva, appeals from a judgment entered against him after a jury convicted him of second degree murder in violation of Penal Code[1] section 187, subdivision (a). The jury also found appellant personally used a knife within the meaning of section 12022. The trial court sentenced appellant to 15 years to life for the murder and one year for the knife-use enhancement for a total of 16 years.

Appellant contends his constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution were violated because the trial court refused to instruct the jury on: (1) perfect self-defense and defense of others; (2) imperfect self-defense and defense of others—as a means of finding voluntary manslaughter; and (3) involuntary manslaughter. Appellant also asserts that the trial court potentially erred in ruling that the prosecution was entitled to withhold (as work product) a detective's notes which were used to refresh a witness's memory at the preliminary hearing. Appellant contends the notes might have provided exculpatory (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*)) and/or discoverable material (§ 1054.1). Appellant argues that the cumulative effect of the errors deprived him of a fair trial in violation of the United States Constitution.

We conclude that the trial court did not err in refusing to instruct on perfect/imperfect self-defense of others or on involuntary manslaughter. The trial court did not violate *Brady* because there was nothing exculpatory in the detective's notes. To the extent that the detective's notes were withheld as work product, there was no prejudice to appellant because the information in the notes duplicated and mirrored the witness's preliminary hearing

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[1] All further statutory references are to the Penal Code unless otherwise stated.

testimony. The cumulative effect of purported instructional errors and the discovery issue was not prejudicial. Accordingly, we affirm the judgment.

The Evidence

The prosecution's witnesses presented two separate versions of the events leading up to the death of Anthony Hernandez by a stab wound to his chest.[2] The witnesses all agreed that there was a group of men fighting but none of the witnesses could identify the person who stabbed Anthony. One version was presented by Orlando Osorio, Rodrigo Chavez and Robert Lopez, who were friends or acquaintances of Anthony. The other version was presented by appellant's relatives: Joseph Garcia, Francisco Garcia and Axely Echeverria.

Anthony's Friends' Version

On October 27, 2012, Orlando was asked to act as a disc jockey (DJ) at a birthday/Halloween party for Adrian Morales at a single-family residence in Sylmar. Orlando invited several people to the party, including the homicide victim, Anthony. Orlando also invited Rodrigo and Robert.

Orlando's equipment was in the garage, which was detached from the house. Around midnight on October 28, 2012, Adrian instructed Orlando to shut down the music in five minutes. As Orlando was playing his last song, appellant came towards him and told him to turn off the music. Orlando told appellant that Adrian had told him that he could play the music five more minutes so Orlando was going to finish playing the last song. Appellant stood there "mad-dogging" Orlando.

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[2] Hereinafter, we use first names of Anthony and witnesses for ease of reference and not out of disrespect.

Joseph[3] approached appellant and asked if he "saw two bitches getting rowdy with [appellant]," meaning Orlando and Rodrigo. According to Robert, Joseph came in with a "mean attitude" and said, "I see these two bitch-ass niggas trying to get down with you." Orlando replied that nobody was getting loud and the party was about to end. Appellant responded to Joseph "that nobody was trying to start nothing" or "everything's fine." It appeared to Orlando that appellant was trying to calm down Joseph.

Rodrigo responded, "Who you calling a bitch-ass nigga?" Joseph approached Rodrigo and said, "I can break your neck if I really want to." Joseph then grabbed Rodrigo's neck. Rodrigo and Joseph began to fight in front of the DJ equipment.

Anthony then came over and tried to defend Rodrigo by pulling Joseph. Anthony and appellant then began to fight with each other by exchanging punches. Robert intervened to get Joseph off Rodrigo. Robert got pushed back and Rodrigo ended up on the floor.

After the fight started, a tall, dark-skinned man named Francisco, also known as "Rock Star," came in and tried to get into the fight. Francisco was acting as "security" for the party. Francisco said something like: "These are my cousins, these are my blood." Orlando, who knew Francisco but not the other men, tried to push away Francisco and tell him that they were all friends and did not need to fight. Orlando was not throwing punches but got hit in the head a few times. Orlando could not hold Francisco back because Francisco is a "big guy."

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[3] Orlando and Rodrigo did not know Joseph or appellant prior to that evening. Orlando and others referred to Joseph as the "guy in the gray sweatshirt" throughout their testimony. Witnesses referred to appellant as the guy wearing a green or turquoise shirt or T-shirt.

Robert testified that, after he was pushed and Rodrigo was on the floor, Joseph and appellant were "both on Anthony." Joseph had Anthony in a headlock or chokehold. Robert and Rodrigo testified that Francisco came in and starting punching Anthony. Before Francisco came in, Anthony was not moving much. Anthony looked tired and weaker. Rodrigo went in and tried to get Joseph and appellant off of Anthony. Rodrigo noticed that Anthony was not moving anymore.

The fight, which included five men, eventually moved to the left side of the garage. Orlando saw Anthony fall down in the garage. Rodrigo pulled Anthony out of the garage. Anthony told Rodrigo that he had been stabbed. Orlando heard Rodrigo say that Anthony had been stabbed.

On direct examination, Orlando testified that, at the time Anthony collapsed, Anthony was fighting with appellant and Francisco. On cross-examination, Orlando testified that Joseph was hitting Anthony and not Francisco. Orlando did not know who stabbed Anthony. He saw Francisco's hands during the fight. When the police asked him who was left, Orlando responded "the two cousins," meaning appellant and Joseph.

Robert did not know who stabbed Anthony or when he was stabbed. He did not see a knife during the fight and did not know what was used to stab Anthony.

Rodrigo did not know who stabbed Anthony. Rodrigo did not see a knife during the fight. Rodrigo did not know what was used to stab Anthony. Rodrigo told the police that the guy in the gray sweatshirt (meaning Joseph) could have stabbed Anthony. Joseph was kind of hiding something behind his back in his left hand. But, Rodrigo could not see whether he was actually hiding anything because a part of Joseph's body was hidden from Rodrigo's view.

Appellant and Joseph tried to follow Rodrigo as he was pulling Anthony out of the garage. According to Orlando and Rodrigo, as Rodrigo pulled Anthony out of the garage, Joseph was still trying to fight Anthony.

Rodrigo and Robert carried Anthony to the front of the house. Orlando and Robert saw a knife near the front gate. The knife had been on a table near a birthday cake. Anthony was bleeding from the stomach area and was having difficulty breathing. He was "out of it" and "seemed like he was dying."

The medical examiner concluded that Anthony died from a three- to four-inch stabbing by a "sharp object," such as a knife. Anthony had a "three-quarter of an inch" stab wound to the chest. The wound went through his chest cavity and the left ventricle of the heart. The medical examiner did not know what object was used to stab Anthony; however, both ends were probably sharp. The wound was not consistent with one inflicted by a beer or glass bottle. Beer bottle wounds are typically not as clean as the wound to Anthony's chest. The wound could have been inflicted by a broken piece of glass. The knife found near the gate was not consistent with Anthony's wound.

Orlando did not see appellant or Joseph in the front of the house. Robert testified that, as soon as he said Anthony had been stabbed, Joseph and appellant disappeared. Francisco remained outside until the police arrived.

Appellant's Relatives' Version of the Fight

Joseph testified under a grant of immunity. Joseph and appellant, who he called "Gage," are first cousins. They grew up together and were more like brothers. Francisco and Joseph are also first cousins. Joseph went to the

party with his girlfriend Axely and one of her friends. Axely was married to Joseph by the time of the trial.

On the date of the incident, Francisco lived with appellant at their grandmother's house. Francisco arrived early to help Adrian set up for the party. Francisco sent appellant into the garage to tell the DJ to turn down the music. Francisco testified that someone told Francisco that appellant was in a fight. Francisco then sent Joseph to go talk to appellant.

According to Axely, Adrian told appellant to tell the DJ to turn off the music. When appellant went over to the DJ, there was a confrontation between appellant, the DJ and Anthony. She told Joseph that appellant was arguing with them. She then left to go find her friend.

Joseph testified that, at around 1:00 a.m., a fight or "rumble" started at the party. Joseph had gone to the restroom. When he returned, Axely told him that a couple of guys had "confronted" appellant. Joseph went to see what was happening. Appellant was there with Orlando and about three other guys.

Joseph approached the "standoff" and blows started flying after some pushing and shoving. Joseph fell and got hit by a couple of guys. When he got up, he hit somebody who approached him. It was a "big rumble" between him, Francisco and appellant on one side and the DJ's entourage on another side. Joseph did not know whether appellant was involved in the rumble. Someone got in the middle and pulled them apart. Joseph still wanted to fight because he felt like he did not get a fair chance.

Joseph subsequently saw the DJ's entourage going toward the front of the house. A female shouted "who stabbed him?" He looked for his hat. Joseph then left in his car with Axely and her friend to go to his grandmother's house, which was around the corner on Oscar Street.

During the fight, neither Joseph nor Francisco had knives. Joseph did not see anyone in the DJ's group with a knife.

On cross-examination, Joseph testified that the fight started after he intervened. Appellant told him everything was okay. Joseph made a comment about "bitch-ass." A guy pushed Joseph and Joseph pushed the guy. Joseph did not know who the guy was that hit him. The guy hit him and Joseph grabbed him and that is when the other guys joined in the fight. Joseph denied saying he would snap anyone's neck or that he could kill them. He denied grabbing anyone by the neck or head.

Joseph did not see appellant do anything. Joseph does not remember whether he was fighting with Anthony. Joseph never saw appellant with a knife at the party.

According to Axely, after she looked for her friend, she returned to the garage. At that point, she saw Anthony take a swing at Joseph. Three "guys" then jumped Joseph and put him on the floor. According to her, there was kind of "a riot" and all the males at the party were in a "big old circle" and everybody, including appellant, was just fighting.

Axely grabbed a bottle to protect herself because she got pushed and was scared. She saw other people in the garage with bottles and heard glass breaking. She told police there were about 10 to 15 people involved in the fight. She subsequently heard a woman say somebody got stabbed. Everybody started "freaking out" and trying to go to the front to leave.

Axely testified that she, Joseph and Francisco went through the front. She did not see appellant leave through the front. She did not know where he went. Joseph testified that appellant left through the alleyway in the back. Joseph thought it was "weird" that appellant left that way while the others were leaving through the front.

Francisco testified that he entered the garage after appellant and Joseph went into the garage. Francisco saw someone acting like he was going to swing at appellant. Francisco told the DJ to calm down his people. Francisco said that he was talking to Orlando and turned to his left. He saw Joseph on the floor fighting with Anthony. Francisco testified at the preliminary hearing that Anthony was on top of Joseph. At some point, Joseph was on top as he was fighting Anthony. Francisco tried to pick up Joseph. Anthony and Joseph kept swinging at each other so Francisco decided to punch Anthony. Francisco punched him about four times. Adrian then grabbed Francisco telling him to calm down. They got pushed out of the garage.

After he was pushed from the garage, Francisco had Joseph from the back, holding him and telling him to calm down. Joseph was screaming, "Let me at him, you're a bitch for hitting me like that."

Francisco did not see appellant during the altercation. Francisco did not see appellant with a knife during the fight.

Francisco saw Anthony walking up the steps to the front of the house. He heard someone ask Anthony if he was okay. When Francisco and then his girlfriend, Elizabeth Orozco, went to the front of the house, they saw Anthony lying on the ground. They tried to help until Adrian asked everyone to leave.

Evidence after the Party

When Joseph arrived at his grandmother's house, appellant was already there. Appellant lived with their grandmother.

Appellant yelled, "Nobody messes with my family." According to Joseph, appellant was angry and mad while he was yelling. Joseph had never seen appellant with an attitude or display aggressiveness like that.

Appellant was constantly saying "nobody messes with my family." Joseph thought appellant's adrenaline was up from the fight.

At some point, appellant took off his shirt. Joseph did not know "if he took off the shirt in rage or just because he was mad and hyped up." After he took off the shirt, appellant threw the shirt in the neighbor's trash can. Appellant was walking up and down and "was still pretty mad, angry."

Francisco arrived later at their grandmother's house. Francisco, Joseph and appellant began talking about "the rumble." Francisco questioned Joseph and appellant about what had happened. Appellant was not wearing the turquoise shirt he had on at the party when Francisco arrived at their grandmother's home.

Appellant "was hyped up, panting, breathing hard, [and] walking around," which was unusual for him. Francisco and Joseph were pressing appellant, wondering why he was acting that way. Appellant was angry and just kept walking around "very, very hyped up" and not saying anything. Francisco knew that appellant's normal reaction was to hyperventilate in stressful situations. Appellant also gets angry when he drinks. Francisco had seen appellant fight before when he would drink. Appellant was trained in jujitsu.

Francisco and Joseph were asking appellant about what happened. Francisco asked if appellant had stabbed Anthony. Appellant said that he had not. Appellant then said, "He's lucky I didn't kill him."

Francisco's ex-girlfriend, Elizabeth, testified that she went back to his grandmother's home after the stabbing.[4] Appellant was there, acting very upset and a bit aggravated. Appellant, Joseph, Francisco and Axely began

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[4] Elizabeth testified that she remembered appellant trying to give Anthony CPR in the front yard right after the stabbing.

discussing the fight and stabbing. When they asked about the stabbing, appellant kept saying "it's done, it's done." Elizabeth remembered Joseph and Francisco confronting appellant and saying, "You're stupid, why did you do it?" Appellant did not reply but started yelling and screaming. He was making noises and said "just leave it alone."

Joseph knew that appellant owned a pocket knife. He had seen it in appellant's room in the past. Appellant had fold-out, pocket knives in his bedroom before the incident.

Francisco asked appellant about a knife because he had seen appellant with a three-inch knife earlier in the night. Francisco saw appellant with the knife at the party before the fight, using it to open beer bottles. The knife could be folded and had a little latch on the back side so the blade could be flipped out in one motion.

When Francisco asked appellant about the knife, appellant responded that he got rid of it. Appellant said he got rid of the knife because he did not want to get into trouble. When Francisco kept pressing appellant about the location of the knife, appellant got angry and said "fuck this shit." Appellant then threw a flashlight at the front of the house.

Axely testified that appellant was being "drunk," "crazy" and "paranoid." He was "fisting up" and breathing heavily. He pulled off his shirt. Appellant's "voice was really loud" and he was talking "gibberish." Francisco and Joseph tried to calm him down, telling him he was being too loud. Appellant took off his shirt and was "just walking up and down the sidewalk" outside their grandmother's house. Elizabeth saw appellant take off his shirt and go towards the neighbor's house.

Axely saw appellant with a small blade before he went towards the neighbor's trash can. The length of the blade was about two to three inches

and was not attached to a bottom piece or handle. Appellant said that he wanted to throw away the blade.

At one point, appellant began to look for his blade. Appellant walked near the neighbor's trash cans and said that he had thrown the blade and shirt in the trash can. Joseph asked appellant why he threw the shirt in the trash can. Appellant told Joseph that he detached the blade from the rest of the knife and wrapped the blade in the green shirt and threw the shirt in the neighbor's trash can. Appellant said "he had to get rid of it."

Joseph went and got the shirt out of the neighbor's trash and put it in the trunk of his car. However, there was no blade in the shirt. Appellant subsequently grabbed a flashlight and began looking for it in the neighbor's trash. When appellant realized the blade was not in the shirt, he was getting mad and threw the flashlight. No one else was that agitated or upset. Joseph, Francisco, Axely, Elizabeth and appellant all started to look for the blade but were not able to find it.

After appellant threw the flashlight, Joseph and Francisco decided to take appellant to Joseph's home in Palmdale because they did not want to wake up their grandmother. Joseph, Axely and appellant began driving to Palmdale. Axely and Joseph's infant son was also in the car.

During the drive to Palmdale, appellant was emotional and crying so much that the baby was startled. Appellant said he wanted to talk to his sister. Appellant continued to cry and said that his deceased grandfather had asked him to make sure he took care of the family.

Axely had appellant's shirt on the floor of the car. Appellant wanted to get rid of the shirt because he mentioned that the shirt might have blood on it. Appellant kept saying "get rid of it because it has blood." Axely told appellant to calm down because there was no blood on the shirt. Appellant

kept saying "no, no, no, no, it's blood, there's blood." Joseph had blood on his shirt which Axely thought was from a cut on his chin that he got during the fight. Joseph did not throw away his shirt.

The baby started to cry. In order to stop the baby from crying and to calm appellant down, Axely told Joseph to stop the car and get rid of the shirt. Joseph got rid of the shirt by throwing it into a Porta Potty at a construction site around the corner from his home.

When he arrived home, Joseph went to bed. The next day, Francisco texted Joseph that Anthony had died. When Joseph told appellant that Anthony had died, appellant had a "blank stare" on his face.

Police Interviews

In an initial interview with police the next day, Joseph did not tell the police about appellant's shirt and the blade. Joseph was not sure that appellant had done it or not. Joseph was trying to protect appellant.

About an hour later, in a second interview, Joseph told the police what happened. Joseph told the truth in the second interview because he did not want to get into trouble for something he did not do. The second interview with the police took place after Joseph was placed in a cell.

Joseph said he did not see who stabbed Anthony but told the police that he thought appellant had done it. Joseph did not know when Anthony was stabbed or what was used to stab the him. Joseph told police he thought appellant had done it because appellant was acting paranoid after the party. Joseph had never seen him act like that before that evening.

Axely testified that she did not recall telling detectives that Joseph and Francisco asked appellant why he did it. But, after Joseph was locked up, he

told her that he had "kinda lied at first" and that she should tell the police everything. She knew that meant she should tell the truth.[5]

Francisco found out later in the morning that Anthony had died. Francisco and Joseph had a discussion about not telling the whole truth when they spoke to the police to help appellant. When he was initially interviewed by the police, Francisco left out "a big chunk of the truth." However, after the police placed him in a cell, he told the truth because he did not want to get into trouble for something he did not do.

The police recovered a T-shirt from a Porta Potty in a construction zone in Palmdale in the afternoon on October 28, 2012. The T-shirt was covered in urine and feces. Officers searched the Oscar Street location but did not find a knife.

Defense Case

Appellant presented character testimony from his friend, Josue Garcia. Josue knew appellant for about 10 or 11 years. Appellant had mixed martial arts and kickboxing training.

Josue and appellant went to parties with each other every other week. Josue was not at the party on the night of the incident. Josue had seen appellant get drunk at parties but had never seen him get into a fight. He described appellant as a quiet drunk. Appellant was pretty shy and quiet. He kept to himself and was pretty laid back. Josue thought it was out of character for appellant to be involved in a fight.

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[5] Apparently, Joseph and Axely were involved in an altercation when they arrived at the party because someone who had been drinking spilled a drink on them. Joseph and Axely were upset. Adrian had to stop Joseph from confronting the man who Adrian said was just drunk.

Jury Instructions

The trial court instructed the jury on second degree murder (CALCRIM No. 520) and that manslaughter was a lesser included offense of murder (CALCRIM No. 500). The trial court instructed the jury on voluntary manslaughter by provocation (CALCRIM No. 570) and heat of passion (CALCRIM No. 570). The trial court refused defense requests for instructions on self-defense and defense of others (CALCRIM No. 505) and imperfect self-defense and defense of others (CALCRIM No. 571). The trial court also refused the defense request for an involuntary manslaughter instruction based on criminal negligence (CALCRIM No. 580).

DISCUSSION

Appellant argues that he was deprived of a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments because the trial court refused to instruct the jury on perfect/imperfect self-defense and defense of another and on involuntary manslaughter.

In criminal cases, the trial court is required to instruct on the general principles of law which are relevant to the issues raised by the evidence and are necessary for the jury's understanding of the case. (*People v. Martinez* (2010) 47 Cal.4th 911, 953; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) "Nevertheless, 'the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he [or she] is not guilty

of the greater offense. [Citations.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) The trial court is not required to instruct a jury based only on conjecture and speculation; however, the court does not assess the credibility of the evidence in determining whether to give an instruction. (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) An appellate court reviews de novo the trial court's refusal to give a required instruction. (*People v. Souza* (2012) 54 Cal.4th 90, 113; *People v. Manriquez* (2005) 37 Cal.4th 547, 581.) In reviewing the trial court's ruling, the appellate court considers the evidence in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 11122, 1137.)

As a preliminary matter, the Attorney General asserts that appellant has forfeited arguments on imperfect self-defense/defense of others and involuntary manslaughter. The record shows that defense counsel requested that the trial court give the imperfect self-defense or defense of others instruction in CALCRIM No. 571 in accordance with *People v. Flannel* (1979) 25 Cal.3d 668, 674, 679, superseded by statute on another point as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 776). The trial court noted that it was refusing to instruct the jury over defense counsel's objection. Thus, issues related to the imperfect self-defense/defense of others instruction were not forfeited.

Similarly, the trial court refused to instruct the jury with CALCRIM No. 580 on involuntary manslaughter over defense counsel's objection. Defense counsel asserted that the act "arguably could have been done with criminal negligence." The prosecution countered that there was no substantial evidence of criminal negligence because appellant stabbed Anthony in the heart. Defense counsel responded that, because no murder weapon was found and no one saw appellant stab the victim, a jury could

infer that appellant's conduct was criminally negligent. The trial court determined there was insufficient evidence "that this was done without an intent to kill. It would just be speculation."

We agree with appellant that this is sufficient to preserve the arguments concerning the trial court's error in refusing to instruct on involuntary manslaughter. We disagree with the Attorney General that the precise theory concerning an involuntary manslaughter instruction raised by appellant has been forfeited. The theory relies on case law emanating from language in *People v. Burroughs* (1984) 35 Cal.3d 824, 836 (*Burroughs*), and culminating in a decision by Division Seven of this District, *People v. Brothers* (2015) 236 Cal.App.4th 24 (*Brothers*). *Brothers* concluded that "an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony." (236 Cal.App.4th at p. 34.) As shown below, although *Brothers* was not decided prior to appellant's trial, some clarification of the issue raised by appellant had been given in a concurring opinion by Justice Kennard in *People v. Bryant* (2013) 56 Cal.4th 959 (*Bryant*). Justice Kennard's analysis was assumed to be correct in *People v. Bryant* (2013) 222 Cal.App.4th 1196 (*Bryant II*) and followed in *Brothers*. Under the circumstances, we conclude that the issue was not forfeited.

I. Perfect/Imperfect Self-Defense and Defense of Others

Appellant argues that the trial court improperly refused to instruct the jury on perfect/imperfect self-defense and defense of others as requested by defense counsel.

A defendant who commits an unlawful killing of a human being with malice aforethought is guilty of murder. (§ 187, subd. (a).) A murder may be

reduced to the lesser included offense of voluntary manslaughter if the defendant commits an unlawful killing without malice aforethought. (§ 192, subd. (a); *People v. Moye* (2009) 47 Cal.4th 537, 549.)

"But a defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense [citations]." (*People v. Barton* (1995) 12 Cal.4th 186, 199.) "'[U]nreasonable self-defense'" is "not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter," which is a lesser included offense of the crime of murder. (*Id.* at pp. 200-201.) A person who kills another with the unreasonable but good faith belief in having to act in self-defense is guilty of voluntary manslaughter because the belief negates the malice. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) The same rule applies when a person kills with an actual but unreasonable belief in the need to defend another person. (*People v. Randle* (2005) 35 Cal.4th 987, 997 (*Randle*), overruled on a different point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

However, "in a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant*'s obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.] [¶] If the issue of provocation or imperfect self-defense is thus 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.] California's standard jury instructions have long so provided. [Citation.] In such cases, if the fact

finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that provocation (or imperfect self-defense) was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 461-462, original italics.)

However, "[t]he charge of voluntary manslaughter *absolves* the People of proving that malice was present. It does not require the prosecution to establish, beyond a reasonable doubt, that *malice was absent*." (*People v. Rios, supra*, 23 Cal.4th at p. 463, original italics.)

In this case, the trial court instructed the jury that the offense of murder could be reduced to manslaughter by provocation and heat of passion. However, the trial court declined to instruct the jury on self-defense or defense of others (CALCRIM No. 505) because the court found there was no evidence that appellant had an actual or reasonable belief that he needed to defend anyone. The trial court also refused to instruct the jury on imperfect self-defense of defense of others (CALCRIM No. 571).

A. There was no evidence of perfect self-defense or defense of others.

Prior to the trial court's instructions to the jury, defense counsel asserted that the trial court should instruct the jury with CALCRIM No. 505 on perfect self-defense or defense of another. When the trial court responded that the instruction was not applicable, defense counsel argued: "Well, judge, I think it's pretty clear that, in this instance, . . . there was a clear fight between several individuals, . . . and a relative of my client. My client was in close proximity to the incident when it took place. I think there was testimony as it relates to blows being thrown, other things being used to try to inflict harm, people with bottles, and . . . in fact, even kicking was being used. And I think . . . that my client—if the prosecution is to be believed,

that he participated in this event, that it was certainly reasonable for him to protect his relatives from this onslaught or this attack where his relative was outnumbered. And I think the testimony is . . . that—I don't believe there was any testimony that my client started the affair. I think it was—and if, in fact, he was involved, it was after the incident started. And I think it's—the jury could reasonably infer from that that he was trying to protect his relative that was being jumped, as it were, by other people."

The court replied that there was no evidence "at all of [an] actual or reasonable belief and the need to defend himself or someone else." The prosecutor added that there was no evidence that any other deadly weapon was used other than that Anthony was stabbed.

Defense counsel argued that there was evidence that several people were on top of appellant's relative punching and attacking him, which caused appellant to enter the fray. A jury could reasonably infer that appellant's intent was to rescue or aid his cousin from an assault that was taking place.

The prosecutor responded: "The only testimony to suggest that Joseph was being attacked was from Joseph, Francisco and Axely. None of them actually testified that they knew where [appellant] was at that moment. So unless there is some evidence to show [appellant] was in a position to reasonably believe or see that Joseph was being attacked, there is no evidence that he reasonably believed that the use of force or self-defense was necessary. And I'd like to add again that because there was no evidence of any deadly weapon being used besides the one the prosecution is claiming [appellant] used, there is no reasonable use of force. The only person that testified they armed themselves with the bottle was Axely, and she was very clear she never used it. She held it against herself for protection."

Defense counsel then argued: "And I think that would certainly be an argument that could be made by the People. But I think that is—it also is an issue that would be best resolved by the jury. And I think to suggest that my client was nowhere around is not borne out by the testimony. I think—it was my recollection Francisco said that Joseph was standing right there and that he pulled [appellant] back, and then he turned around and Joseph was on the floor fighting after he was attacked by [Anthony]. I think it's—there is certainly evidence—again, I think there's plenty of evidence that the jury could reasonably infer that this was a self-defense—defense of others type situation."

The prosecutor argued that the issue was what appellant reasonably perceived. There was no evidence "as to whether or not [appellant] reasonably saw at that moment that [Joseph] was being attacked and [appellant] reasonably felt that force was necessary." The prosecutor added that the defense requires that the jury determine whether or not a defendant's beliefs are reasonable.

The trial court ruled: "All right. I don't think there's substantial evidence of an actual reasonable belief for self-defense or defense of another. So I'm not going to give [CALCRIM No.] 505."

"For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] As the Legislature has stated, '[T]he circumstances must be sufficient to excite the fears of a

reasonable person . . . .' [Citations.] Moreover, for either perfect or imperfect self-defense, the fear must be of imminent harm. 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*).)

In addition, "[a]lthough the belief in the need to defend must be objectively reasonable, a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' [Citation.] It judges reasonableness 'from the point of view of a reasonable person in the position of defendant . . . .' [Citation.] To do this, it must consider all the ""acts and circumstances . . . in determining whether the defendant acted in a manner in which *a reasonable man* would act in protecting his own life or bodily safety."" [Citation.]" (*Humphrey, supra,* 13 Cal.4th at pp. 1082-1083.) The defendant is entitled to have the jury consider all the elements in the case which might be expected to operate in the defendant's mind." (*Id.* at p. 1083.)

Under the circumstances of this case, the trial court properly determined that the instruction was not warranted because there was no substantial evidence that appellant stabbed Anthony in the heart in self-defense or in defense of another. There was conflicting testimony about the events leading up to the fatal stabbing. However, there was absolutely no evidence that appellant, who is trained in martial arts, actually or reasonably believed he needed to stab Anthony in the heart to defend himself or his cousin Joseph.

According to the DJ's entourage, prior to the fight appellant was "mad-dogging" Orlando about when the music should be stopped. Joseph then

entered the garage and escalated the situation. Joseph was acting very aggressive prior to the fight. Joseph came in and asked appellant if some "bitch-ass niggas" were messing with appellant. When Rodrigo asked, "Who you calling a bitch-ass nigga?", Joseph responded that he could crack Rodrigo's neck. Joseph then grabbed Rodrigo's neck and placed him in a chokehold. Anthony and Robert then intervened to free Rodrigo from the chokehold. Appellant and Anthony began to fight with each other.

Joseph ultimately put Anthony in a headlock. Joseph and appellant punched Anthony in the face and ribs. Francisco, who by all accounts was a big guy, soon got into the group fight. Francisco testified that he punched Anthony four times. Prior to intervening in the fight, Francisco yelled, "These are my cousins, these are my blood." Joseph, Francisco and appellant were seen punching Anthony before he became weak and motionless.

Although appellant's relatives testified that, at one point in the fight, Joseph ended up on the ground, there was no evidence that appellant had an actual or objectively reasonable belief that he needed to stab Anthony in the heart. (*Humphrey, supra,* 13 Cal.4th at pp. 1082-1083.) Weak evidence that Joseph was on the ground being punched is not substantial evidence that a rational person would have believed appellant needed to use deadly force in self-defense or to defend his cousins. (*People v. DePriest, supra*, 42 Cal.4th at p. 50.) Indeed, appellant's relatives subsequently questioned him about his motives in stabbing Anthony. Elizabeth said Joseph and Francisco told appellant he acted "stupid" in stabbing Anthony. Appellant's explanation for stabbing Anthony in the heart was that "nobody messes with [his] family." Appellant added that Anthony was "lucky I didn't kill him." After the fight, appellant was seen leaving through the back of the home. All the other participants in the rumble were seen in the front of the home.

Appellant went to his grandmother's home, where he was in an agitated state walking up and down the street and removing the shirt he had worn to the party. Appellant dismantled the knife his cousin Francisco had seen appellant use in opening beer bottles at the party prior to the fight. Appellant wrapped the blade in his shirt and tossed the shirt into in his neighbor's trash. When Joseph removed the shirt from the trash can, the blade was missing. Appellant was so agitated he threw a flashlight. Appellant, his cousins, Axely and Elizabeth then began searching for a blade. On the way to Palmdale, appellant began obsessing over the shirt which had been retrieved from the trash can. Appellant insisted that there was blood on the shirt, which Joseph eventually tossed into a Porta Potty. When Joseph told appellant that Anthony had died, appellant had a blank stare on his face.

In sum, there was no evidence whatsoever that appellant had stabbed Anthony with an actual or objectively reasonable belief that he needed to defend himself or his two cousins by stabbing Anthony in his chest. Because there was no evidence as to why appellant stabbed Anthony in the heart during the fight, the trial court did not err in refusing to instruct the jury on perfect self-defense or defense of others.

Thus, even if we concluded that the instruction should have been given, it is not reasonably probable that appellant would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see also *Randle, supra,* 35 Cal.4th at p. 1003.) There simply was no factual basis for finding that appellant had an actual or objectively reasonable belief that he needed to stab Anthony in the chest. Given the absence of evidence, any failure to instruct was harmless beyond a reasonable doubt under the federal constitutional test in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

B. There was no evidence of imperfect self-defense/defense of others.

Appellant also asserts that the trial court should have instructed the jury on imperfect self-defense in CALCRIM No. 571. Imperfect self-defense is an actual but unreasonable belief that it is necessary to defend oneself from imminent danger of death or great bodily injury which negates malice aforethought, a required element of murder, and reduces the chargeable offense to manslaughter. (*Humphrey, supra*, 13 Cal.4th at p. 1082; *In re Christian S.*, *supra*, 7 Cal.4th 768, 771.)

There was no substantial evidence in the record to show that appellant actually believed that he needed to stab Anthony to defend himself or his two cousins. The fact that the three of them were fighting another group of men was not so threatening that it supported an inference that appellant believed he needed to defend himself or his two cousins from imminent death or great bodily injury.

As we previously discussed, appellant was the initial aggressor in the situation leading to the fight when he began "mad-dogging" Orlando about the music. Joseph entered the garage and escalated the situation with his comments about "bitch-ass niggas." Joseph grabbed Rodrigo by the neck, placing him in a chokehold. Appellant and Anthony then began to fight each other. Joseph at some point had Anthony in a chokehold as he and appellant punched Anthony in the face and ribs. Francisco, the "big guy" cousin who was supposed to be the security for the party, also began punching Anthony.

No evidence was offered as to why appellant would have been in fear of that Anthony was going to kill or inflict great bodily injury on appellant or his cousins. The prosecution's evidence did not suggest that the killing was done as an honest response to a perceived danger. Absent evidence that appellant actually believed he needed to defend himself or his cousins from

imminent death or great bodily injury, the trial court was not required to instruct on unreasonable self-defense or defense of others. (*People v. Rios, supra,* 23 Cal.4th at p. 463.)

In any event, it is not reasonably probable that appellant would have obtained a more favorable result if the jury was given the instruction on imperfect self-defense or defense of others. (*Watson, supra*, 46 Cal.2d 818, 836; see also *Randle, supra,* 35 Cal.4th at p. 1003.) There is no factual basis for finding that appellant believed when he stabbed Anthony that appellant needed to defend himself or his cousins from imminent death or great bodily injury. Appellant, who was trained in martial arts, brought a pocket knife to the party. There was no evidence that anyone else had a knife or any other weapon during the fight. Prior to the fight, appellant was "mad-dogging" Orlando. His cousin Joseph came into the garage in an aggressive manner, threatening to crack Rodrigo's neck. Joseph placed Rodrigo in a chokehold, which caused Anthony to intervene. Appellant then began punching Anthony. Joseph eventually placed Anthony in a chokehold and he and appellant were punching Anthony's face and head. Big guy cousin Francisco then began punching Anthony. It is not reasonably probable under *Watson* the jury would have returned a more favorable verdict had instructions been given on perfect or imperfect self-defense or defense of others given the lack of evidence as to what appellant believed. Any error in failing to instruct on imperfect self-defense/defense of others was harmless beyond a reasonable doubt under *Chapman*.

C. An instruction on involuntary manslaughter was not warranted.

Appellant asserts that the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter based on his theory that his conduct in stabbing Anthony was "criminal negligence." The

parties dispute whether this case is controlled by case authorities such as *Bryant, supra,* 56 Cal.4th at page 974 (conc. opn. of Kennard, J.), *Bryant II, supra*, 222 Cal.App.4th 1196, and *Brothers, supra,* 236 Cal.App.4th 24.

"'Involuntary manslaughter is manslaughter during "the commission of an unlawful act, not amounting to a felony," or during "the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."' (§ 192, subd. (b).)" (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1026.)

"'The words "without due caution and circumspection" refer to criminal negligence—unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences. (*People v. Penny* (1955) 44 Cal.2d 861, 879.) If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice. [Citation.]' [Citations.]" (*People v. Guillen, supra,* at p. 1027.)

Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) "Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger." (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) Our Supreme Court has "'interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . .

acts with a conscious disregard for life.' [Citation.]" [Citation.]'" (*Bryant*, 56 Cal.4th at p. 965; see also *People v. Rangel* (2016) 62 Cal.4th 1192, 1220.)

The issue in the case arises from language in our Supreme Court's 1984 decision in *Burroughs, supra,* 35 Cal.3d 824, that "a killing without malice in the commission of a noninherently dangerous felony would constitute involuntary manslaughter if 'committed without due caution and circumspection.' [Citation.]" (*Bryant, supra,* 56 Cal.4th at p. 966.) In *Burroughs,* our Supreme Court explained that: "the only logically permissible construction of section 192 is that an intentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (35 Cal.3d at p. 835, overruled on a different point in *People v. Blakely* (2000) 23 Cal.4th 82, 88-91.)

The language in *Burroughs* was discussed recently in *Bryant, supra,* 56 Cal.4th 959, wherein the defendant killed her boyfriend by stabbing him once in the chest with a knife. (*Id*. at p. 963.) *Bryant* considered what offense was committed by the defendant, who had killed without malice, in the commission of an assault with a deadly weapon. (*Id*. at pp. 966-967.) *Bryant* concluded that "[a] defendant who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life." (*Id*. at p. 970.)

Bryant, supra, 56 Cal.4th 959, concluded that the trial court in that case could not have erred in failing to instruct the jury on voluntary manslaughter and reversed the appellate court's opinion concluding

otherwise. (*Id*. at pp. 970-971.) However, *Bryant* declined to consider defendant's contention that, based on a theory articulated in *Burroughs,* the trial court erred in failing to instruct on involuntary manslaughter because assault with a deadly weapon was not an inherently dangerous felony. (*Ibid*.) The high court refused to consider the issue because it was not a ground upon which review was granted or one which the appellate court had considered. (*Id*. at p. 971.)

In a concurring opinion in *Bryant, supra,* 56 Cal.4th 959, Justice Kennard concluded that an assault with a deadly weapon can constitute an unlawful act that makes a killing committed during the assault an involuntary manslaughter. (*Id*. at pp. 971, 974.) Justice Kennard concluded that, because the defendant in *Bryant* had presented evidence that the killing occurred while the defendant was committing an assault with a deadly weapon, the jury could have been instructed on involuntary manslaughter. (*Id*. at p. 975.) However, the trial court did not have a sua sponte duty because the rule of law articulated by Justice Kennard's concurring opinion was "so obfuscated by infrequent reference and adequate elucidation" that it could not be considered a general principle of law. (*Ibid*.)

On remand to the appellate court, the defendant in *Bryant* argued that the trial court had a sua sponte duty to instruct the jury that an unlawful killing committed without malice in the course of an assaultive felony constituted the crime of involuntary manslaughter. (*Bryant II, supra,* 222 Cal.App.4th at pp. 1200, 1203.) The defendant argued the instruction was required under the theory articulated in *Burroughs* and as a manslaughter "catch-all" for homicides that do not amount to murder. (*Bryant II, supra,* 222 Cal.App.4th at pp. 1203-1204.) *Bryant II* assumed but did not decide that the instruction was warranted by the evidence. (*Id*. at p. 1205.)

However, *Bryant II* concluded that the trial court did not have a sua sponte duty to instruct the jury that an unlawful killing committed without malice in the course of an assaultive felony is manslaughter. (*Id*. at pp. 1205-1206.) This is because "there is no authority holding that an unlawful killing committed without malice in the course of an assaultive felony constituted the crime of involuntary manslaughter" pursuant to the defendant's theories. (*Id*. at p. 1204.)

In *Brothers, supra,* 236 Cal.App.4th 24, Division Seven of this District noted that the Attorney General was correct in arguing the Justice Kennard's concurring opinion in *Bryant* that a homicide committed without malice during the course of an inherently dangerous assaultive felony was involuntary manslaughter was not controlling. (*Brothers,* p. 33.) *Brothers* also noted that *Bryant* did not reach the issue. (*Brothers,* at p. 33.) However, *Brothers* concluded: "[I]f an unlawful killing in the course of an inherently dangerous assaultive felony without malice must be manslaughter [citation] and the offense is not voluntary manslaughter [citation], the necessary implication of the majority's decision in *Bryant* is that the offense is involuntary manslaughter. Accordingly, an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony." (*Brothers*, at pp. 33-34.)

Thus, appellant is correct that, under *Brothers*, an involuntary manslaughter instruction must be given when a rational jury could have a reasonable doubt that an unlawful killing was committed with implied malice while the defendant is committing an inherently dangerous assaultive felony. However, even under the *Brothers* standard, there is no duty to instruct when

there was no substantial evidence which justifies the instruction. (*Brothers, supra*, 236 Cal.App.4th at p. 34.) The existence of weak evidence is not sufficient because instructions on a lesser included offense are only required where there is substantial evidence. (*People v. DePriest, supra,* 42 Cal.4th at p. 50; *Brothers,* at p. 34.)

As the *Brothers* court explained: "[W]hen . . . the defendant indisputably has deliberately engaged in a type of aggravated assault the natural [and probable] consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter. [Citations.] Otherwise, an involuntary manslaughter instruction would be required in every implied malice case regardless of the evidence. We do not believe that is what the Supreme Court intended in *Bryant*." (*Brothers, supra*, 236 Cal.App.4th at p. 35.)

In this case, the trial court denied the request on the basis that there was no "sufficient evidence that this was done without an intent to kill. It would just be speculation." Appellant relies on the following evidence to support his claim that substantial evidence warranted an involuntary manslaughter instruction. No one could account for when the stabbing took place. There were a number of people fighting with flying fists, blows and kicking. Axely armed herself with a bottle for protection. There was breaking glass near the fight. Witnesses described the fistfight as a "riot" or "big rumble." Axely testified that about 10 to 15 people were fighting and swinging at each other. Appellant was stressed out and hyperventilating after the fight.

We conclude that the trial court properly refused to instruct on involuntary manslaughter because the evidence did not support such an instruction. The record is devoid of evidence explaining how and when appellant stabbed Anthony in the chest. There was evidence of a heated altercation between several combatants. However, as in *Brothers*, there is no evidence that appellant accidentally killed Anthony or was grossly negligent in stabbing him. In fact, there is no evidence of appellant's subjective understanding of the risk posed to Anthony's life from appellant's act in stabbing him in the chest. Rather, the only reasonable inference from the evidence presented was that appellant fatally stabbed Anthony in the chest during a fistfight, the natural consequence of which would be dangerous to a human life. Considering the evidence in a light most favorable to appellant, we are not able to conclude that there is substantial evidence from which a rational juror could have concluded appellant was guilty of involuntary manslaughter.

Under the circumstances, it is not reasonably probable that appellant would have obtained a more favorable result even if the jury was instructed on involuntary manslaughter. (*Watson, supra*, 46 Cal.2d 818, 836; see also *Randle, supra,* 35 Cal.4th at p. 1003.)

II. <u>The Detective's Notes</u>

Appellant has asked us to independently review the sealed notes of Los Angeles Police Department Detective Gretchen Schultz and determine whether the trial court erred in allowing the notes to be withheld as her work product after the in camera *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 review. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232.) The notes were written by Detective Schultz from a police interview of Axely.

The issue arose at the preliminary hearing during Axely's testimony. The prosecutor asked whether Axely remembered telling Detective Schultz that the victim punched Joseph first. Axely initially testified that she did and then testified that she did not remember saying that to Detective Schultz. The prosecutor then showed Axely Detective Schultz's notes of Axely's statement to refresh her memory.

Defense counsel did not have the notes, which had been generated by the detective. The prosecutor asserted that the detective's notes were "work product" and not discoverable. The court then held an off-the-record discussion about the notes. When the matter went back on the record, the prosecutor refreshed Axely's recollection with the police report of Axely's interview, which had been turned over to the defense.

The trial court subsequently held a discovery hearing to determine whether appellant was entitled to Detective Schultz's notes, which were not in the police report of the interview. The audio of the interview, as well as a transcript of the interview, had been turned over to the defense. The trial court indicated that the portion of the notes used to refresh Axely's memory was discoverable under Evidence Code section 771.[6]

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[6] Evidence Code section 771 governs the production of writings used to refresh a witness's memory at a hearing. It provides in part: "(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken. [¶] (b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness. [¶] (c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing: [¶] (1) Is not in the possession or control

The prosecutor then argued that the notes were not raw notes of the interview, which would be discoverable. Detective Schultz apparently went through all the witness recordings and typed out every one of the 20 interviews of the witnesses. The prosecutor stated and defense counsel did not dispute that all the interviews and transcripts had been turned over to the defense. The prosecutor argued that the detective's notes intertwined with the detective's impressions after the interview, which "impressions" were not discoverable under *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480 (*Thompson*).

Defense counsel contended the police officer impressions were discoverable and material. Defense counsel asserted that there was no privilege to refuse to disclose the detective's notes under Evidence Code section 911, which provides: "(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing."

The trial court subsequently reviewed the document and ordered it sealed at defense counsel's request for review on appeal. Prior to sealing the document, the trial court asked the prosecutor to confirm that the document was based on Detective Schultz's listening to Axely's recorded interview. The prosecutor stated that Axely's recorded interview, along with a transcript, had been turned over to the defense. The trial court apparently did not review the actual police interview. The record on appeal does not contain Axely's interview or a transcript of her interview. However, she and Detective Schultz testified at trial.

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of the witness or the party who produced his testimony concerning the matter; and [¶] (2) Was not reasonably procurable by such party through the use of the court's process or other available means."

The trial court ordered the prosecutor to turn over the first page of the detective's notes because it had been used to refresh Axely's memory. The court sealed the remainder of the document "based on the fact that the prosecution has already turned over the entire audio recording of that witness along with a transcript." The trial court reasoned that "the best information is the audio itself" and the document was just notes of the audio. The trial court stated: "The only notes used to refresh the memory of the witness, which was page 1, was turned over. The balance of the notes, which I have reviewed, merely reiterates and mirrors what's on the recordings and the preliminary hearing testimony of the witness." The trial court then ordered the prosecution to turn over any *Brady* material or exculpatory evidence.

At a subsequent discovery motion, defense counsel asserted that there was no "work product" privilege for police officers.[7] The trial court stated that any "raw notes from interviews of witnesses" were discoverable. However, the detective's "work product," which consisted of notes she wrote down while re-listening to an audio recording of a witness, was not discoverable once there is a recording that has been turned over to the defense. The trial court explained that the detective's subjective reasoning would not be admissible.

The prosecutor contended that the detective's notes taken of the recorded interview were just "homework" in preparation for the trial.

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[7] At the second hearing, defense counsel argued that the trial court should examine and seal notes from an additional 20 witness interviews. Defense counsel conceded, however, that the defense had been given a number of reports and statements written by Detective Schultz, which were labeled work product. The trial court refused to review and seal all the additional notes.

Defense counsel argued that the notes were not attorney work product and were discoverable under section 1054.1 "regardless of whether they were contemporaneous with the interview or not."

The trial court concluded that the best evidence was the audio recordings. The detective's notes made while listening to the recordings were "redundant" and "superfluous" to the recordings which had been turned over to the defense.

A. There was no *Brady* error.

Appellant contends that the failure to disclose the notes in accordance with *Brady* potentially deprived him of a fair trial in violation of the federal Constitution.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady, supra,* 373 U.S. at p. 87.) The obligation to disclose the evidence exists even in the absence of a request. (*Kyles v. Whitley* (1995) 514 U.S. 419, 438 (*Kyles*); *People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*); *In re Brown* (1998) 17 Cal.4th 873, 879.) The duty encompasses impeachment evidence, exculpatory evidence and evidence known only to police investigators and not the prosecution. (*Salazar,* at p. 1043.)

Evidence is material under *Brady* "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*Kyles, supra*, 514 U.S. at pp. 433-434; *Salazar, supra*, 35 Cal.4th at p. 1043.) "Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that

Brady was not satisfied is reversible without need for further harmless-error review. [Citation.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-1133.)

We have reviewed the sealed document, which contains Detective Schultz's notes, the preliminary hearing testimony of Axely and her trial testimony. The notes do not contain any impeachment evidence, exculpatory evidence or any matter unknown to the defense. Axely's preliminary hearing testimony, as well as her trial testimony, was duplicative of the matters contained in the detective's notes. There is nothing in the notes that was not stated by Axely in the preliminary hearing. We are unable to conclude that the refusal to disclose the notes was material under *Brady* because "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*Kyles, supra*, 514 U.S. at pp. 433-434; *Salazar, supra*, 35 Cal.4th at p. 1043.)

B. There was no prejudicial error under section 1054.1.

Appellant also asserts that the notes were discoverable under section 1054.1, the reciprocal discovery statute. Section 1054.1 "'independently requires the prosecution to disclose to the defense, in advance of trial or as soon as discovered, certain categories of evidence 'in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies.' (§ 1054.1.) Evidence subject to disclosure includes '[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged' (*id.,* subd. (c)) and '[a]ny exculpatory evidence' (*id.,* subd. (e)). Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)" (*People v. Zambrano, supra,* 41 Cal.4th at p. 1133.) A violation of section 1054.1 is

subject to the *Watson* harmless error standard. (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.)

Appellant contends that the refusal to disclose the notes on the basis that they were police "work product" violated section 1054.1. Appellant is correct that there is no authority supporting the conclusion that police notes of interviews of witnesses taken based on a recorded interview are subject to protection as police work product. Appellant is also correct that Evidence Code section 911 supports the conclusion that the notes were not privileged.

However, we agree with the Attorney General that *Thompson*, *supra,* 53 Cal.App.4th 480, supports the theory that the notes were properly withheld because they were merely the "impressions" of the police officer. In *Thompson*, over the defendant's objection, the trial court ordered a defendant to turn over to the prosecution "raw written notes" from interviews by a defense investigator and one of his attorneys of witnesses who might testify at trial. (*Id*. at p. 482.) The trial court exempted any *attorney* work product from the order. (*Ibid*.)

On appeal, *Thompson* concluded "that raw written notes of witness interviews, other than attorney work product, are 'statements' as defined in sections 1054.3, subdivision (a), and 1054.1, subdivision, (f), and thus must be disclosed by both sides." (53 Cal.App.4th at p. 485.) The reciprocal nature of the discovery statutes thus required the compelled disclosure of "raw written notes of police and prosecutors' witness interviews." (*Id*. at p. 488.) However, although the discovery statutes compel disclosure of raw written witness interview notes reflecting the witness's statement, the statutes do not require the disclosure of "the impressions or opinions of the interviewer, regardless of whether the notes are used to produce a formal written witness statement report." (*Ibid*.)

In this case, the sealed notes were taken from the audio recording of Axely's interview, which was transcribed. The audio and the transcription of the interview were both turned over to the defense. The police officer's notes of the audio recording are not raw notes of the witness interview. We should also point out that the notes do not appear to have any real impressions or opinions of the witness. Thus, there was no error in refusing to disclose the notes.

In any event, everything that is in the notes was brought out in Axely's preliminary hearing testimony. Among the primary purposes of the discovery statutes are the promotion of "'the ascertainment of truth in trials by requiring timely pretrial discovery' . . . . These objectives reflect, and are consistent with, the judicially recognized principle that timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts.' [Citations.]" (*In re Littlefield* (1993) 5 Cal.4th 122, 130-131.)

We have examined the balance of the notes and the preliminary hearing testimony. Axely's testimony was duplicative of what is in the notes. There is nothing in the notes that was not in Axely's testimony. Furthermore, the issue arose when the prosecutor used the first page of the notes to refresh Axely's memory during the preliminary hearing about whether Anthony struck Joseph. After an off-the-record discussion at the preliminary hearing, the prosecutor then used the police report of Axely's interview to refresh her memory. At a suppression hearing, pursuant to Evidence Code section 771, the trial court ordered the first page of the notes turned over to defense counsel because it was used to refresh Axely's memory.

Assuming there was error in refusing to disclose the notes, we cannot conclude that it is reversible under *Watson*. Even if the notes had been turned over in their entirety, it is not reasonably probable that the jury would have returned a more favorable verdict in the case. As we have previously discussed, the only evidence in this case is that appellant killed Anthony by stabbing him in the chest during a fistfight. No other participants in the fight had weapons. Appellant was seen with a pocket knife at the party before the fight. Appellant left the party through a rear exit immediately after Anthony was stabbed. Appellant dismantled a pocket knife at his grandmother's home. He then took off the shirt he had been wearing at the party and wrapped the blade in the shirt, which he tossed into the neighbor's trash can. After the shirt was retrieved from the trash and a search for the blade was unsuccessful, appellant threw a flashlight. Appellant insisted that his cousin dispose of the shirt as they were driving to Palmdale because appellant thought there was blood on the shirt. Under the circumstances, even if the notes had been turned over, no reasonable jury would have returned a different verdict.

III. <u>The Cumulative Error Claim</u>

Appellant argues the cumulative effect of claimed errors deprived him of a fair trial. The purported instructional errors in this case do not exist so there were no effects on the process or fairness of appellant's trial. There was also no *Brady* error. To the extent that there is no police work product privilege, any purported error was harmless under *Watson* or harmless beyond a reasonable doubt under *Chapman*. Appellant was "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.